

# Mortgage Repurchase and Make-Whole Defense: The Latest Strategies and Tips to Resolve Repurchase Claims

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## Overview

- I. **Part I: Legal Defenses to Repurchase Claims**
  - Detailed Examination of Various Legal Defenses Available to Lenders.
- II. **Part II: Rebuttal Strategies**
  - Specific Strategies to Rebut Common Repurchase Allegations.
- III. **Part III: The Effect of Industry Settlement Agreements**
  - Overview of Major Settlement Agreements Between Secondary Market Investors and Agencies.
- IV. **Part VI: Current Litigation Landscape**
  - Current Litigation Landscape with Major Institutional Investors.
  - Latest Repurchase Litigation Defense and Resolution Strategies.
  - Settlement Strategies to Obtain Mutually Acceptable Resolutions.
- V. **Part V: FHFA New Representation and Warranties Framework**
  - Discussion of FHFA's New Representation and Warranties Framework.
- VI. **Part VI : Concluding Thoughts**
  - Final Thoughts and Tips on Repurchase Defense.

These issues will be discussed – ***and your questions answered*** – by James Brody.



## **Part I:**

# **Legal Defenses to Repurchase Demands**

*Aside from factual rebuttals, there are numerous legal arguments that can be made regardless of the accuracy of the repurchase allegation.*



## **Challenge a Repurchase Demand Based on Rescission of Mortgage Insurance**

- Investors have long pushed back loans to its correspondents based upon mortgage insurance rescissions.
- Make sure you have standing to deal with the MI companies directly. This often requires you to obtain a written consent from your Investor.
- Correspondents must fight back on various bases including:
  1. The fact that the MI company “contract underwrote” the file and is now rescinding MI due to its own negligence;
  2. The MI company’s allegations, even if true, are immaterial and/or do not increase the risk of the hazard insured for;
  3. The “incontestability clause” that prohibits rescission for third-party misrepresentations, and for other reasons;
  4. Fight back these MI rescissions through Insurance Commissioner;
  5. Investors often push correspondents to repurchase loans for similarly dubious MI rescissions. It is imperative to appeal these MI rescissions.



## **Challenge a Repurchase Demand Based on Materiality**

- Some Loan Purchase Agreements base repurchase obligations on *material* violations of the representations and warranties.
- Things to consider when challenging the materiality of an allegation:
  1. Were there any compensating factors, such as potential rent for undisclosed mortgage?
  2. Did the allegation increase the risk of the transaction?
  3. How many payments were made on the loan?
  4. Was the subsequent default the result of unforeseen circumstances, i.e. loss of job.



## **Challenge a Repurchase Demand Based on the Full Credit Bid Rule**

- Did the Investor and/or FNMA purchase the property at a foreclosure sale via a credit bid?
  - A Lender and/or servicer making a credit bid at a foreclosure sale is acting in its capacity as a purchaser and is not required to bid the full amount of the loan.
  - Courts have held that the amount bid at a foreclosure sale sets the value of the property acquired. Specifically, when property is purchased at a foreclosure sale for the amount due on the mortgage, the debt is satisfied and the mortgage is extinguished.
  - When a Lender bids for the amount due on the mortgage at a foreclosure sale, it is not required to pay cash, but rather is permitted to make a credit bid because any cash tendered would be returned to it. This is known as a “Full Credit Bid.”
  - However, whether or not the Full Credit Bid Rule applies depends on the choice-of-law of the LPA and/or the state of the subject property.



## Challenge a Repurchase Demand Based on Loss Mitigation

- Did the Investor and/or Agency effectively mitigate its damages with respect to the subject loan?
- Things to consider when challenging an Investor's loss mitigation:
  1. Review the servicing history for instances of negligence.
  2. Was the subject property liquidated at market value?
  3. Request a detailed breakdown of all alleged damages.
  4. Were mortgage insurance proceeds deducted from any claimed damages?
  5. Was there an unreasonable lapse in time between foreclosure and REO sale?
- BUT in recent repurchase litigation involving CMI, courts in the Eastern District of Missouri have upheld CMI's alleged damages *irrespective* of its lack of loss mitigation effort.



## Challenge a Repurchase Demand Based on the Statute of Limitations

- There are inconsistent rulings regarding whether the statute of limitations (“SOL”) begins to run on the date of the first alleged breach, i.e. - when loan documents with misstatements are transferred to the Investor; or when a lender refuses to comply with the demand.
- Things to consider when challenging a demand based on the SOL:
  1. What state law governs the Loan Purchase Agreement with the Investor? What is the applicable SOL for breach of contract claims in that state?
  2. How many years have lapsed since origination?
  3. How many years have lapsed since demand was first made?





## **Statute of Limitations for Specific Investor Loan Purchase Agreements**

- Lehman Brothers Holdings, Inc. – 6 years (N.Y. C.P.L.R. § 213 (McKinney)).
- GMAC/Ally Bank – 6 years (Minn. Stat. § 541.05, subd. 1(1)).
- Bank of America - 4 years (Cal. Civ. Proc. Code § 337).
- Chase - 6 years (N.J. Stat. Ann. § 2A: 14-1; N.Y. C.P.L.R. § 213 (McKinney)).
- CitiMortgage – 10 years for contract dispute over payment of money (Mo. Ann. Stat. § 516.110; see also *Hughes Dev. Co. v. Omega Realty Co.*, 951 S.W.2d 615, 617 (Mo. 1997)); 5 years for all actions upon contracts, obligations or liabilities (Mo. Ann. Stat. § 516.120).
- Wells Fargo – 6 years (Minn. Stat. § 541.05, subd. 1(1)).
- FlagStar – 6 years (Mich. Comp. Laws Ann. § 600.5807(8)).
- Franklin America Mortgage Company – 6 years (Tenn. Code Ann. § 28-3-109).
- US Bank – 6 years (Wis. Stat. Ann. § 893.43).



## The Statute of Limitations Debate

- Investors often argue that the SOL does not begin to run until a repurchase demand is refused by a Lender, while Lenders may argue that the SOL begins to run on the date of sale.
- Certain courts applying NY state law have found that repurchase and indemnification are actually remedies, therefore the breach commences on the date that the loan documents are transferred.
- Specifically, a federal judge in Washington State, applying NY state law, ruled that the SOL for repurchase claims commenced on the date upon which the Investor could have initially demanded payment for the alleged misrepresentations – i.e., the date Investor purchased the loan from the originator. *See LBHI v. Evergreen*, 793 F. Supp. 2d 1189 (2011).
  - *See also, Hahn Automotive Warehouse, Inc. v. Am. Zurich Ins. Co.*, 81 A.D.3d 1331, 916 N.Y.S.2d 678, 680 (2011), holding that “[a] cause of action for breach of contract accrues when the party making the claim possesses a legal right to demand payment...To find otherwise would allow an Investor to circumvent the statute of limitations by deferring its demand.”
  - *See also, Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2005-S4 ex rel. HSBC Bank USA, Nat. Ass'n v. Nomura Credit & Capital, Inc.*, 39 Misc. 3d 1226(A) (N.Y. Sup. Ct. 2013), holding “[t]he repurchase obligation in this case is merely a remedy. It is not a duty independent of the Mortgage Representation breach of contract claims. The statute of limitations runs from the time of breach of the Mortgage Representations, not from the time plaintiff elected to make demands for repurchase.”
- Conversely, Investors point to *LBHI v. National Bank of Arkansas (“NBA”)*, which supports the position that a separate breach occurs when the originator fails to repurchase a loan, as required by contract.
  - It is important to note that much of the current SOL debate only applies to NY state law and therefore only pertains to LPA’s which are governed by NY law, such as LBHI and Chase.



## **Part II: Rebuttal Strategies**

*Specific strategies and tips to rebut common repurchase allegations.*



## **Strategies for Rebutting an Unsupported Appraisal Allegation**

- Unsupported appraisal is a common repurchase allegation.
- Things to consider when fighting back an allegation of unsupported appraisal:
  1. Order a retrospective review appraisal through your in-house or outside counsel;
  2. Analyze the appraiser's scope of work, the comparable selections (facts v. opinion);
  3. Also consider putting the original appraiser and his/her E&O carrier on notice.
- Investors often continue to seek repurchase based upon unsupported appraisal, even with a supportive retro appraisal.



## Strategies for Rebutting an Undisclosed Liability Allegation

- Recalculate the DTI to determine whether the alleged undisclosed debt would increase the DTI by more than the allowed 2% variance.
- Review the guidelines to confirm whether or not the revised DTI exceeded the maximum allowed under the applicable guidelines.
- Were there any compensating factors that would offset the payment, such as potential rent for undisclosed mortgage?
- Confirm that the undisclosed debt actually existed prior to closing of the subject transaction.  
Specific Example:
  - Issue: Two undisclosed student loans with a combined monthly payment of \$214 yielded excessive DTI and rendered the origination DU approval invalid.
  - Rebuttal: One of the two loans was closed after the subject transaction, and the another loan was disclosed on the 1003 and accounted for in qualifying.



## Strategies for Rebutting an Income Misrepresentation Allegation

- Request all supportive documentation referenced by the Investor in the repurchase demand.
- Review the Loan Purchase Agreement (“LPA”) for any discussion of “knowledge” or “awareness” with respect to the representations and warranties and repurchase obligations.
- Was the loan product a stated income loan product or full doc?
  - Challenge the allegation based on whether or not the borrower’s income was “reasonable” rather than “accurate.”
- Specific Example:
  - Issue: The stated income was unreasonable as the borrower just moved to Colorado three months prior to the loan origination.
  - Rebuttal: The borrower had been working as a chiropractic physician and an expert witness for twenty years. His practice was upon a national reputation, which was not geographically restricted.



## **Strategies for Rebutting a Guideline Violation Allegation**

- Facts, facts, facts: Review the specific facts of the underlying allegation in conjunction with the applicable underwriting guidelines.
- Request that the Investor provide you with the exact Sellers' Guide that was in place at the origination of the subject loan, including any and all associated policies, release notes, bulletins, revisions, amendments, clarifications, corrections, updates, newsletters, memos or training manuals/presentations provided directly to the Lender or the lending industry in general.



## **Strategies for Rebutting a Missing Documentation Allegation**

- Review the loan file to determine whether or not the document was in fact omitted from the loan file.
- Request that the Investor provide a detailed checklist of everything included in the loan file at the original sale.
- Reach out to the borrower for missing documentation, such as bank statements, W-2's, gift letters, etc.
  1. Did the borrower sign an Errors & Omission Agreement or a Compliance Agreement?
  2. Consider compensating the borrower for his/her time and effort in obtaining the requested documents.





## Strategies for Rebutting an Occupancy Allegation

- A Lender can only warrant that a borrower *intends* to occupy the property at origination.
- Intent is a state of mind and can change over time. Further, intent is a “promissory” warranty and is therefore limited to the facts in existence at the time of sale/contracting.
- A Lender can only represent that it has verified the borrower’s *intent* to occupy, based upon all the facts and circumstances of the transaction, and simply *cannot* represent that the borrower *will* actually occupy the subject property.



# How to Work with the Agencies and Active Investors

- Many Investors have withdrawn from the third-party origination business, leaving Wells Fargo as the biggest Investor in the secondary market, followed by Chase and Flagstar.
- These Investors and the Agencies know that you depend upon this business relationship and will use it to force you to meet their demands.
- Things to consider when responding a repurchase demand:
  - Employ the same general rebuttal strategy;
  - Respond to the Investor's demand within the deadline;
  - Fannie Mae's and Freddie Mac's new repurchase guidelines;
  - Have your attorney ghostwrite the rebuttal response for you;
  - Consider third-party recovery.
- Investors are much less likely to rescind a demand once they repurchase the loan from the Agencies or their Investors.



## **Part III:**

# **The Effect of Industry Settlement Agreements**

*An overview of the settlement agreements between different Investors and the Agencies and the potential effects on resulting repurchase liability.*



## A Brief Recap of Bank of America's 2010 Settlement with the Agencies

- The settlement with Fannie Mae resolved the existing pipeline of approximately 18,000 outstanding repurchase/make-whole claims as of September 20, 2010, in relation to loans sold by legacy Countrywide to Fannie Mae.
  - Bank of America paid Fannie Mae \$1.52 billion to resolve \$3.1 billion in outstanding claims, or about 49 cents on the dollar.
- The *global* settlement with Freddie Mac resolved ALL outstanding and potential repurchase and make-whole claims related to approximately 787,000 loans sold to Freddie Mac by Countrywide through December 31<sup>st</sup> 2008.
  - Bank of America paid Freddie Mac \$1.28 billion to resolve \$1 billion in outstanding claims and \$127 billion in potential claims sold by Countrywide through 2008. This equals only 1.01% of the outstanding amount of unpaid principal balance on the Countrywide loans owned by Freddie Mac.
- Taken as a whole, Bank of America paid approximately 40 cents on the dollar to resolve approximately \$6.8 billion in original repurchase claims from the Agencies.



## The 2013 Bank of America Settlement with Fannie Mae

- Bank of America has agreed to pay Fannie Mae approximately \$10.3 billion to resolve current and future repurchase demands for loans delivered by Bank of America and Countrywide that were originated between January 1, 2000 and December 31, 2008.
- Pursuant to the settlement agreement, Bank of America will:
  - Make a cash payment of \$3.55 billion; and
  - Repurchase approximately 30,000 loans from Fannie Mae with an unpaid principal balance and accrued interest for a total of \$6.75 billion as of November 30, 2012.
  - See Fannie Mae’s Form 8-K:  
<http://www.fanniemae.com/resources/file/ir/pdf/form8k-010713.pdf>.



# The 2013 Bank of America Settlement with Fannie Mae (cont.)

- The settlement agreement also provides that:
  - Bank of America remains responsible to repurchase additional loans if the grounds for repurchase are based on certain excluded defects (ex. third-party indemnification and recourse obligations with respect to the loans by the settlement).
  - Fannie Mae will retain ownership of all of the loans covered by the cash settlement.
- See <http://www.fanniemae.com/resources/file/ir/pdf/form8k-010713.pdf>



## The 2013 CitiMortgage Settlement with Fannie Mae

- On July 1, 2013, CitiMortgage, Inc. (“CMI”) announced that it has entered an agreement with Fannie Mae to resolve potential future repurchase claims for breaches of representations and warranties on 3.7 million residential first mortgage loans sold to Fannie Mae that were originated between 2000 and 2012 (“Covered Loans”).
- As part of the settlement agreement, CMI agreed to pay Fannie Mae \$968 million and will continue to service the mortgage loans included in this deal. This is important because if CMI paid pennies on the dollar to settle these loans with Fannie Mae, then its Lenders should at least enjoy the same discount.
- The settlement agreement however does not release CMI’s liability with respect to a population of less than 12,000 loans originated between 2000 and 2012 with certain characteristics such as loans sold with a performance guaranty or under special credit enhancement programs.

## **How Should Your Settlement Strategy Change in Light of the Recent Settlements with Fannie Mae and Freddie Mac?**

- As with any negotiation, preparation is key:
  - Determine whether or not the loan was likely included in the Fannie Mae or Freddie Mac settlement by looking at the date of sale and date of demand.
  - Demand that BOA/CMI provide a detailed analysis as to how any payments made with respect to the Fannie Mae or Freddie Mac settlement were allocated to the subject loan.
  - Request that any discount that BOA/CMI enjoyed with respect to the Fannie Mae or Freddie Mac settlement be applied to the claimed damages.





## National Mortgage Settlement

- The agreement settles state and federal investigation findings that the country's five largest mortgage servicers (Ally/GMAC, Bank of America, Chase, CitiMortgage, Wells Fargo) routinely engaged in abusive mortgage servicing, such as robo-signing, lost paperwork, and missed deadlines for loan modification.
- What does this mean to you?
  - If a loan is owned by Fannie Mae or Freddie Mac, then it was not included in the settlement.
  - The settlement covers loans that were foreclosed between Jan. 1, 2008 and Dec. 31, 2011.
  - We have seen at least one Investor (Chase) who rescinded the repurchase demands on loans that are covered by the settlement.
  - You are not responsible for any losses as a result of the Investor's improper handling of the foreclosure.



## **Part IV:**

# **The Current Litigation Landscape**

*Many Investors have taken different approaches with regard to repurchase litigation; some are more active than others. This section will discuss the current repurchase litigation trends and various settlement strategies to obtain mutually acceptable resolutions.*

## Decisions in Repurchase Lawsuits Remain Inconsistent

- In January of this year, a federal judge in Florida ruled that Lehman Brothers Holdings, Inc. could not bundle eight separate loans into one single lawsuit due to the lack of commonality among the various factual circumstances pertinent to each of the eight loans. See *Lehman Brothers Holdings, Inc. v. Universal American Mortgage Company, LLC*, 11-CV-20859-JLK. Further, the Florida ruling was upheld by a Colorado judge when LBHI's petition to consolidate the lawsuits in a Colorado court was denied on April 17, 2013.
- However, in 2011, a New York state court judge in *Syncora Guarantee, Inc. v. Countrywide Home Loans, Inc.*, held that in a case of rescission of mortgage insurance, Syncora was not required to show a direct causal link between individual breach of warranty and subsequent claim payment made pursuant to the insurance policy if the alleged misrepresentation was material. In other words, as long as Syncora could show materiality of the misrepresentations, it did not have to show breach of warranty in every loan that was at issue. Therefore, the court did not permit separate trials for separate loans.
- Some LPAs may expressly permit a lawsuit involving multiple loan repurchase claims to proceed despite individual claim differences. For those who are about to sign a new LPA with any given Investor, be sure to review the documents to see whether such a clause has been included by the Investor.



## Chase

- Chase has been increasingly litigious and has become more inclined to sue its Lenders for just one or two loans.
- The law governing the Chase LPA is New Jersey state law. However, some Chase LPA's are governed by New York law. Both have a 6-year statute of limitations for a contract claim (N.J. Stat. Ann. 2A: 14-1 (2011)) and adopts the accrual-at-breach rule. See *Holmin v. TRW*, 330 N.J. Super. 30, 35 (App.Div.); See also *Soward v. Deutsche Bank AG*, 814 F. Supp. 2d 272, 284 (S.D.N.Y. 2011).
- If you are being sued by Chase, you might want to consider deposing its underwriters. According to its internal emails and employee interviews, Chase has consistently dismissed, and at times whitewashed, the negative quality-control reports about the mortgage loans so that the loans would appear healthier.
  - <http://dealbook.nytimes.com/2013/02/06/e-mails-imply-jpmorgan-knew-some-mortgage-deals-were-bad/>



## **Lehman Brothers Holdings, Inc.**

- LBHI has been quick to file suit once a repurchase demand is refused. It is not uncommon for LBHI to file suit over just one or two loans.
- The law governing the LBHI LPA is New York state law. It has a 6-year statute of limitations for a contract claim N.Y. C.P.L.R. § 213 (McKinney).
- There is much debate regarding the SOL in New York for repurchase claims. Accordingly, if you are sued by LBHI, we recommend raising the SOL defense, if applicable.
- In addition, if LBHI files suit against you for more than one loan, you might consider challenging the consolidation based upon the Universal American Mortgage Company case.

## Bank of America Litigation

- Bank of America has not been very litigious as of yet with respect to repurchase actions.
- Nonetheless, several things to consider if you are served with a complaint from Bank of America:
  - Governing law: California law.
  - Statute of limitation: Four (4) years for a breach of contract claim (Cal. Civ. Proc. Code § 337). Lenders should persuade the court to adopt the *Evergreen* holding.
  - California's absolute right to a jury trial.



## CitiMortgage

- Citi has enjoyed a windfall by litigating in the Eastern District of Missouri:
  - The court has upheld Citi's calculation of repurchase prices (Section 2301 of the CMI Manual), which does not take into account of the adequacy and reasonableness of its liquidation procedures;
  - The court has also held that, despite the knowledge clause of Section 2(i) of the LPA, Section 11(ii) allowed Citi to demand repurchase *even if* the Lender complied with the CMI Manual;
  - In one case, the court held that “there can be no bad faith if [CitiMortgage] simply performed the actions expressly granted it by the parties' agreement, including determining that loans were defective and needed to be repurchased.” See *CitiMortgage, Inc. v. Just Mortg., Inc.*, 4:09 CV 1909 DDN, 2012 WL 1060122 (E.D. Mo. Mar. 29, 2012).
- In several instances, the court has denied the Lender's requests to depose several of the Citi whistleblowers, who have substantial knowledge about Citi's questionable lending practices and internal quality control.
- We believe the court's holding on the damage calculation is erroneous because the it did not consider (1) whether Citi used reasonable effort to mitigate its damages as required by law; and (2) whether it actually suffered any damages. Without analyzing these two issues, the repurchase price calculation amounts to nothing more than a penalty, which is typically unavailable in a contract dispute.
- We are currently presenting opportunities to appeal some of the decisions.



## Flagstar

- Flagstar has become more litigious and has sued its correspondent Lenders for one or two loans.
- Michigan is a “Full Credit Bid” state. Generally speaking, where an Investor bids at a foreclosure sale the full amount owed, the debt is effectively satisfied as if paid in full and the Lender is treated as having suffered no loss. Therefore, it is not entitled to recover from other sources.
- BUT, if the property is located in another state, Flagstar will likely raise a choice-of-law issue. In one case, the choice-of-law provision was overruled by the court as the LPA’s governing law had no equivalent to the Full Credit Bid Rule of the state where the trustee’s sale took place. See *ING Bank, FSB v. Mata*, CV-09-748-PHX-GMS, 2009 WL 4672797 (D. Ariz. Dec. 3, 2009)





## Wells Fargo

- Recent lawsuit with the U.S. District Attorney involving alleged mortgage fraud;
  - <http://www.justice.gov/usao/nys/pressreleases/October12/WellsFargoLawsuitPR.html>
- Wells Fargo's Third-Party Originator ("TPO") list might be actionable:
  - Intentional interference with prospective business advantage; and
  - Trade Libel/business defamation.
    - Some defendant originators have argued these claims in cross-complaints against Wells Fargo. See *Wells Fargo Bank, N.A. v. Direct Mortgage Corporation*, 12-cv-20859-JLK
- Wells Fargo knows that Lenders rely on their business relationship with Wells Fargo and often demands its Lenders to remit the full repurchase/make-whole price.



## **Franklin American Mortgage Company**

- Franklin American Mortgage Company (“FAMC”) has become more litigious in recent months.
- FAMC is filing suit in Tennessee as its LPA is governed by Tennessee law.
- FAMC has been inclined to sue for only one or two loans and has a litigation threshold of as little as \$250,000.



## Litigation Settlement Strategies

- Depending on the Investor, we usually see repurchase claims settle for 30-40 cents on the dollar.
  - Claims involving indemnification agreements often settle for 50-60 cents on the dollar.
- Due to the high cost of litigation, Investors are often more willing to negotiate once litigation has commenced.
- Challenge the loss figures claimed by the Investor.
- Request that the Investor remove all prejudgment interest for the purposes of settlement negotiations.
- Consider a global settlement with the Investor to resolve all known and unknown claims.



## **Part V: FHFA New Representation and Warranties Framework**

*At the end of 2012, FHFA published a new representation and warranty framework for loans that are closed and sold to Fannie Mae or Freddie Mac on or after January 1, 2013.*



## **The New Agency Representation and Warranty Framework**

- The new representation and warranty framework applies to conventional loans sold or delivered on or after January 1, 2013. It aims to clarify and provide more certainty on Lenders' repurchase exposure and liability on future deliveries.
- Under this framework:
  - Lenders will be relieved of certain repurchase obligations for loans that meet specific payment requirement. For example, certain rep and warrant relief will be provided for loans with 36 months of consecutive, on-time payments.
  - HARP loans will be eligible for certain rep and warrant relief after an acceptable payment history of only 12 months following the acquisition date.
- The new framework also moves the quality control review process from the time a loan defaults to the time the loan is delivered to Fannie Mae or Freddie Mac, generally between 30 to 120 days after loan purchase.
- Lenders will likely experience an increase in the number of performing loans that are selected for review, as well as an increase in the number of upfront rejections.



## Mortgage Loans Eligible For Relief Under the New Framework

- The mortgage loan must have a January 1, 2013 or later acquisition date.
- Only conventional loans are eligible. Government-insured or guaranteed loans are not eligible for the relief.
- The mortgage loan cannot have any credit enhancement (such as additional collateral, third party guarantee, etc.) other than the traditional primary mortgage insurance.
- For loans *other than* Fannie Mae's Refi Plus and DU Refi Plus or Freddie Mac's Relief Refinance Mortgage, relief is available if the borrower:
  - was not 30 days delinquent during the 36 months following the acquisition date; or
  - (1) had no more than two 30-day delinquencies and 60-day or greater delinquencies during the 36 months following the acquisition date, and (2) was current as of the 60<sup>th</sup> month following the acquisition date.
    - Essentially, there are two opportunities for repurchase relief.



## Eligible Mortgage Loans (cont.)

- For Fannie Mae's Refi Plus and DU Refi Plus or Freddie Mac's Relief Refinance Mortgage, relief is available if the borrower:
  - had no 30-day or greater delinquencies during the first 12 months following the acquisition date; or
    - Fannie Mae Refi Plus, DU Refi Plus and Freddie Mac Relief Refinance Mortgage have shorter delinquency requirements.
  - (i) had no more than two 30-day Delinquencies, and no 60-day or greater delinquencies, during the first 36 months following the acquisition date; and (ii) was current as of the 60<sup>th</sup> month following the acquisition date.



## **What Reps and Warrants Will a Lender Be Relieved?**

- A Lender will not be required to remedy an eligible mortgage loan (i.e., repurchase, make-whole, etc.) if that loan violates Fannie Mae's or Freddie Mac's selling guides relating to:
  - The underwriting of the borrower, which includes the seller's assessment of the borrower's loan terms, credit history, employment and income, assets, and other financial information used for qualifying the borrower for the mortgage;
  - The underwriting of the subject property, which is the analysis of the description and valuation of the property to determine its adequacy as collateral for the mortgage; and
  - The underwriting of the project in which the subject property is located, which is the analysis of the PUD project, condo, or co-op in accordance with the selling guides.





## Life of Loan Representation and Warranty Exclusions

- The Lender/seller will be responsible for all the following representations and warranties for the life of the loan:
  - Charter Act matters;
    - <http://www.fhfa.gov/getfile.aspx?fileid=29>
  - Misstatement, misrepresentation, and omissions involving (1) two or more Mortgages or related real estate transactions, and (2) made by two or more of the aforementioned parties;
    - Lender/s knowledge, or lack thereof, of the misstatement, misrepresentation, and omissions is irrelevant.
  - Data inaccuracies;
    - However, FNMA has failed to differentiate between data inaccuracies and underwriting errors.
  - Clear title/first-lien enforceability;
  - Compliance with laws and responsible lending practices; and
    - For example, following the “ability to pay” rule.
  - Single-Family mortgage product eligibility.
  - See 2013 Fannie Mae Single-Family Selling Guide, Section A2-3.2-02; 2013 Freddie Mac Single-Family Seller/Service Guide, Volume 1 Section 6.14.



## Fannie Mae's New Repurchase Guidelines

- As of January 1, 2013, if a seller/servicer wishes to appeal, it must submit a written appeal with *all* supporting documentation related to the appeal in one consolidated package within **60 days** of its receipt of Fannie Mae's repurchase or make-whole demand. The appeal must also specifically identify (and cite) applicable sections of the Selling/Servicing Guide and/or Lender Contract that support the appeal. If no written appeal is received by Fannie Mae within the 60-day time frame, Fannie Mae will assume that the seller/servicer does not contest its requests and will not accept any further appeals for that particular matter.
- If Fannie Mae denies a timely submitted appeal, the responsible party must take one of these four actions within **15 days** from the denial letter (or within any other time frame specified by Fannie Mae in writing): (1) complete the repurchase; (2) submit the make-whole payment; (3) submit a second appeal if it has additional material information; or (4) if repurchasing an active loan that will involve a transfer of servicing, the responsible party must notify Fannie Mae of the name of the new servicer and the date of the servicing transfer.
- See Fannie Mae's Servicing Guide Announcement SVC-2012-21



## Freddie Mac's New Repurchase Guidelines

- Freddie Mac's new purchase guidelines are substantially similar to those of Fannie Mae's. The seller/servicer has **60 days** of the issuance date of Freddie Mac's repurchase/make-whole claim.
- If Freddie Mac denies the initial appeal and the seller/servicer discovers new information to support its contention, then it can submit a second appeal with the supporting documentation within 15 days of the denial.
- See Freddie Mac's Industry Letter dated October 19, 2012



## How to Minimize Future Buybacks Under the New Framework

- Implement internal procedures to ensure quality underwriting. This includes:
  - Fully comply with the underwriting guidelines.
  - Pull the credit report once more right before or on the date of the closing.
  - Ask the borrower if anything has changed since the application.
  - Put the closing agent on notice. Make a special note in the closing instructions to instruct the closing agent to watch out for any recent transactions it closed for the same borrower.
    - Request written authorization from the closing agent that the borrower and/or subject property were not involved in residential mortgage transactions within the 36 months prior to the subject transaction.
  - Consider conducting your own post-closing audit.



## **Part VI:**

# Concluding Thoughts



## Final Repurchase and Make-Whole Tips

- Repurchase Allegations:
  - Review the relevant facts in context with the applicable guidelines;
  - Determine whether or not the relevant LPA contains a “knowledge” or “awareness;”
  - Challenge the Investor’s loss figures and mitigation efforts;
  - Review the servicing notes for any potential negligence;
  - Inquire about the Investor’s settlement with the Agencies, if applicable;
  - Determine whether or not the SOL argument applies;
- Consider outsourcing your repurchase issues to a law firm.
- If the settlement negotiation is not going anywhere and you are sued by your Investor, don’t panic. Consult your attorney. Sometimes you might be able to obtain a more favorable settlement after a lawsuit is commenced.
- If you are signing a new LPA, have your attorney review it and watch out for certain pitfalls (i.e. make sure that that you are required to repurchase a loan *only if* you were aware of the defect at the time of origination).

The logo banner is a horizontal strip divided into three sections. The left section shows a wooden gavel resting on a surface with an American flag in the background. The middle section shows a classical building facade with columns. The right section is a solid dark blue background. The text "AMERICAN MORTGAGE LAW GROUP P.C." is written in white, bold, sans-serif capital letters across the top of the banner.

**AMERICAN MORTGAGE LAW GROUP** P.C.

**THANK YOU!**